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Supreme Court, U.S.
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No. 01-1740

In the

Supreme Court of the United States

AMERICAN MOTORISTS INSURANCE COMPANY,

Petitioner,

v.

GTE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ENTERED FEBRUARY 25, 2002

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Appellant-Petitioner American Motorists Insurance Company ("AMICO") respectfully submits this reply to the brief filed by Appellee-Respondent, GTE Corporation ("GTE") in opposition to AMICO's Petition for Writ of Certiorari ("Brief in Opposition").

ARGUMENT

I. THIS COURT'S REVIEW IS NEITHER LIMITED TO, NOR CONTROLLED BY, THE ILLUSTRATIVE EXAMPLES OF "COMPELLING REASONS" SET FORTH IN SUPREME COURT RULE 10 (a)-(c)

GTE protests that AMICO has failed to address any of the three "compelling reasons" enumerated in Supreme Court Rule 10. *See* Brief in Opposition at 3. While Rule 10 (a)-(c) provides some illustrations of the types of "compelling reasons" that justify this Court's grant of a writ of certiorari, these illustrations neither control nor fully measure the Court's discretion, as Rule 10 makes clear. *See* Sup.Ct.R. 10. Consequently, AMICO was not obligated to discuss the examples set forth in Rule 10 (a)-(c) in its petition, and any reliance that GTE places on AMICO's decision not to do so as a basis to oppose AMICO's petition is misplaced and should be dismissed outright.

As AMICO's petition and reply brief make clear, this case presents issues of law and public policy that are every bit as "compelling" as those examples provided in Rule 10 (a)-(c). Therefore, this Court's review of this case is warranted and AMICO's petition for certiorari should be granted.

II. THE SECOND CIRCUIT'S DISREGARD OF CONTROLLING NEW YORK LAW WARRANTS THIS COURT'S REVIEW OF THIS CASE

GTE reasons that, because this case involves questions of state law and state public policy, this Court's review is unwarranted. *See* Brief in Opposition at 4. On the contrary, "this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state ha[s] not answered them, the answers [are] difficult, and the character of the answers which the highest state courts might ultimately give [remains] uncertain." *Meredith v. Winter Haven*, 320 U.S. 228, 237 (1943). Indeed, this Court has reviewed many such questions of state law. *See, e.g., Wichita Royalty Co. v. City Nat'l Bank*, 306 U.S. 103 (1939); *Six Cos. v. Joint Highway Dist.*, 311 U.S. 180 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940); *Cole v. Richardson*, 405 U.S. 676 (1972); *Leavitt v. Jane L.*, 518 U.S. 137 (1996).

Ironically, GTE relies on *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) — in which this Court found that the lower court of appeals ***erred*** in invalidating a state statute — for the proposition that this Court will "uniformly defer" to a federal court of appeals' construction of the law of a state within its jurisdiction. Accordingly, GTE contends that this Court will not review a lower federal court's determination of state law in diversity cases. *See* Brief in Opposition at 4. GTE is mistaken. Curiously absent from GTE's brief is the portion of *Brockett* wherein this Court emphasized that such a rule "is not ironclad." *Id.* at 500. Rather, this Court has acknowledged that it "surely [has] the authority to differ with the lower federal courts" as to their interpretation of state law. *Id.* This Court's reversal of the court of appeals in *Brockett* clearly demonstrates this principle.

As this Court has explained:

> If, as we have said, the courts of appeals owe no deference to district court adjudications of state law ... surely there is no basis for regarding panels of circuit judges as "better qualified" than we to pass on such questions... . Our general presumption that courts of appeals correctly decide questions of state law reflects a judgment as to the utility of reviewing them in most cases ... not a belief that the courts of appeals have some natural advantage in this domain... . That general presumption is obviously inapplicable where the court of appeals' state-law ruling is plainly wrong... .

Leavitt, 518 U.S. at 145 (citations omitted). This Court can and should review the important questions of state law and public policy presented here, given the potential harm to the judicial system threatened by the rulings of the courts below.

Further, while the issues presented in this case emanate from the contract law and public policy of the State of New York, AMICO is not asking this Court only to determine whether the Second Circuit correctly applied New York law. AMICO is also asking this Court to determine whether any federal court of appeal sitting in diversity can disregard the controlling law of the state that it is obligated to apply.

As discussed in AMICO's original petition, AMICO filed a four-count Complaint for Declaratory Judgment and Other Relief against GTE in the District Court, seeking a declaration that it was under no obligation to provide GTE defense or indemnity in the underlying products liability lawsuit styled as *Estate of Steven R. Nunn v. GTE Sylvania, Inc., et al.*, No. C-11012 (N.Y.Sup.Ct., Chautauqua County) (the "*Nunn* lawsuit"). In Count Two, AMICO asserted that GTE had breached the subrogation condition in its insurance policy because the

preclusive sanction issued against GTE for its willful discovery violations had prejudiced AMICO's rights of subrogation against GTE's co-defendants ("Subrogation Defense").

On August 4, 1999, the District Court granted GTE's motion to dismiss AMICO's complaint pursuant to FRCP 12(b)(6). (A-9 to A-18). Specifically, the District Court rejected AMICO's Subrogation Defense on the basis that it was not supported by existing New York law, or even an extension thereof. (A-14 to A-15). However, on June 28, 2001, the New York Appellate Division issued its decision in *Shaw v. Bronfman*, 284 A.D.2d 267, 727 N.Y.S.2d 428 (N.Y. App. Div. 2001), which established New York precedent supporting AMICO's Subrogation Defense.

In *Shaw*, a decision involving analogous facts, the court found that preclusive sanctions entered against a policyholder for willful discovery violations compromised the insurer's ability to bring a subrogation claim against those third parties believed to be truly at-fault. As a result, the *Shaw* court found that the policyholder had violated the subrogation clause contained in its policy, and concluded that the insurer was therefore relieved of any obligation to indemnify the policyholder.

Because the New York Appellate Division decided *Shaw* over one year ***after*** the District Court dismissed AMICO's Complaint, the District Court did not have *Shaw* to guide it when predicting New York law. AMICO emphasized the importance of *Shaw* during its oral argument before the Second Circuit and read the citation of the case into the record. AMICO argued to the Second Circuit that the holding in *Shaw* was directly applicable to the facts of this case and that, in light of this intervening precedent, the Second Circuit should reverse and remand that portion of the District Court's decision that related to AMICO's Subrogation Defense. Rather than recognize *Shaw* for the intervening precedent that it was, however, the Second Circuit summarily affirmed

the District Court's October 3, 2000 Judgment and its February 27, 2001 Amended Judgment "for substantially the reasons" that the District Court had given. (A-3).

In its opposition, GTE contends that the Second Circuit ***declined*** to follow *Shaw*. *See* Brief in Opposition at 7, n 3. This assertion is pure conjecture and should be ignored. Since the Second Circuit never issued a written opinion, it is impossible for GTE to credibly assert that the Second Circuit declined to follow *Shaw*. In fact, given that the Second Circuit affirmed "for substantially the reasons" given by the District Court — and the District Court could not possibly have considered *Shaw* — it is far more reasonable to conclude that the Second Circuit did not even consider the relevance of *Shaw*.

More importantly, the Second Circuit did not have the authority to decline to follow *Shaw*. This Court has long recognized that, in deciding questions of state law in diversity cases, a federal court is obligated to identify and apply controlling state law. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In identifying the controlling law of a state, a federal court will look to the pronouncements of that state's highest court. *See Id.* Where the state's highest court has not yet spoken, a federal court must look to the controlling law from that state's appellate courts. *See Stoner*, 311 U.S. at 467; *Six Cos*, 311 U.S. at 188. Thus, a federal court is not at liberty to ignore applicable precedent, particularly when such precedent is brought to the court's attention.

The Second Circuit was obligated to address *Shaw*, an intervening decision rendered by a New York Appellate Court on analogous facts and an identical legal issue that unambiguously supports AMICO's Subrogation Defense.[1] Despite

[1] In asserting that the District Court and Second Circuit properly rejected AMICO's Subrogation Defense, GTE contends that AMICO failed to plead the "necessary element" of the existence of a release given by the insured to the allegedly liable third-party. *See* GTE's Opposition to Petition, page 6. Because GTE cited *Shaw*, it is aware that the New York

AMICO having expressly brought the decision to the court's attention at oral argument, the Second Circuit made no mention whatsoever of *Shaw* in its summary order.

This Court has emphasized, "[t]o be sure, we do not normally grant petitions for certiorari solely to review what purports to be an application of state law; but we have done so ... **and undoubtedly should do so where the alternative is allowing blatant federal-court nullification of state law.**" *Leavitt*, 518 U.S. at 144-145 (citations omitted) (emphasis added). The Second Circuit's indifference to the controlling and applicable state authority that it was obligated to apply is exactly the type of federal-court nullification that warrants this Court's review, reversal and remand.

III. THIS COURT'S REVIEW OF THIS CASE IS APPROPRIATE BECAUSE THE SECOND CIRCUIT IMPROPERLY DISMISSED AMICO'S FOUR COUNT COMPLAINT

The Second Circuit also erred when it affirmed the dismissal of AMICO's Cooperation Defense. GTE maintains that the District Court and the Second Circuit properly rejected AMICO's Cooperation Defense because AMICO did not plead the elements for a cause of action of breach of an insurance contract's cooperation clause, as it currently exists under New York law. *See* Brief in Opposition at 5. However, the District Court and the Second Circuit failed to appreciate that AMICO never wished to assert a claim for breach of the cooperation clause under existing New York law. Instead, AMICO urged the District Court and the Second Circuit to

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Appellate Division clearly found that the policyholder's discovery abuses and preclusive sanctions in *Shaw* prejudiced the insurer's subrogation rights despite the absence of a release given by the policyholder to the allegedly liable third party. It is unclear how GTE can find the existence of a release to be a necessary element for a cause of action based upon breach of the subrogation provision when the New York Appellate Division did not find it so.

recognize a logical extension of the law to circumstances in which a policyholder willfully abuses state or federal rules of civil procedure, as the trial court determined that GTE had done in the underlying *Nunn* lawsuit. Failing to appreciate this distinction, the District Court insisted that AMICO slavishly allege the elements of the cause of action, as it currently exists. Because AMICO did not do so, the District Court dismissed AMICO's Cooperation Defense. (A-14).

Significantly, in its August 14, 1999 order dismissing AMICO's complaint, the District Court itself acknowledged that AMICO is entitled to expect its policyholders to abide by the Federal Rules of Civil Procedure. (A-13). Yet, in dismissing AMICO's Cooperation Defense, the District Court has denied AMICO any recourse against those policyholders that willfully refuse to do so. This inconsistency is irreconcilable. The Second Circuit denied AMICO the opportunity to make a good faith argument for an extension of law on this issue when it affirmed the District Court's dismissal of AMICO's Cooperation Defense. This error justifies this Court's review.

In addition, the Second Circuit erred by affirming the District Court's dismissal of AMICO's Public Policy Defense. This error is particularly disconcerting in light of the repercussions the District Court's dismissal, and the Second Circuit's affirmance of same, will have on New York's judicial system. GTE asserts that the lower courts properly dismissed AMICO's Public Policy Defense because AMICO was using the defense to change New York public policy. *See* Brief in Opposition at 7. GTE's argument has no merit. AMICO never sought to change New York public policy, but rather, extend public policy to a situation that desperately deserves it. There is no question that sanctions are punitive, whether they are monetary or preclusive in nature. By dismissing AMICO's Public Policy Defense, however, the District Court created an unwarranted distinction between monetary and preclusive

sanctions, the insurability of which turns on the superficial nature of the sanction imposed. An increase in discovery abuses by insured litigants in New York — and perhaps elsewhere —is the logical consequence of the decisions below, and poor public policy.

Furthermore, it is obvious that GTE's settlement of the *Nunn* lawsuit was tainted by the preclusive sanctions imposed against it for its willful discovery abuses. GTE entered into its settlement with the claimant after the New York Appellate Division affirmed the preclusive sanctions that the trial court had imposed upon GTE in the underlying *Nunn* lawsuit, a determination that GTE understatedly characterizes as an "adverse pretrial ruling." Brief in Opposition at 8. Insurance coverage for a settlement tainted by such egregious discovery abuses frustrates public policy, and it was error for the Second Circuit and District Court to find otherwise.

For similar reasons, GTE is disingenuous when it maintains that its $4.5 million settlement with the claimant did not have a punitive damage component. *See* Brief in Opposition at 8. GTE does not deny that it entered into its settlement with the claimant after the trial court had imposed preclusive sanctions upon GTE, sanctions which included a jury instruction that would have laid the foundation for a punitive damage award. Nor can GTE deny that it settled with the claimant only after counsel for the claimant had made his intentions to seek punitive damages known. At the very least, the nature of GTE's settlement presents questions of fact as to whether GTE's settlement was, to some degree, punitive in nature. As a result, AMICO was entitled to present its Punitive Damages Defense to a jury. The District Court and the Second Circuit dismissed AMICO's Punitive Damage Defense before it had the opportunity to do so. This Court's review is appropriate in light of such error.

IV. THE SECOND CIRCUIT'S INDIFFERENCE TO AMICO'S REQUEST FOR CERTIFICATION IS PLAIN ERROR THAT JUSTIFIES THIS COURT'S REVIEW

As AMICO's original petition and reply brief make clear, the four defenses that AMICO raised in this case present important questions of law that are anything but "well-settled." Brief in Opposition at 9. Recognizing the significance of these questions of law, AMICO requested that the Second Circuit certify the questions to the New York Court of Appeals for its consideration. According to GTE, the Second Circuit decided not to certify AMICO's questions on the basis that they involve well-settled legal principles. *See* Brief in Opposition at 9. GTE's representation is again unsupported conjecture. A review of the Second Circuit's three page summary order demonstrates that the Second Circuit did not ***decline*** to certify the questions of law, but, rather, disregarded AMICO's request altogether. The Second Circuit should have certified these questions to the New York Court of Appeals. At the very least, it should have expressly denied AMICO's request. It did neither. This indifference to AMICO's request is error that requires this Court's review, reversal and remand.

CONCLUSION

By affirming the District Court's dismissal of AMICO's Complaint for Declaratory Judgment and Other Relief for substantially the same reasons as those provided by the District Court, the Second Circuit ignored controlling New York authority. In doing so, the Second Circuit violated the well-established principles of judicial review. As such, this Court's review of this case is warranted.

Furthermore, by affirming the District Court's ruling, the Second Circuit has contributed to the creation of extremely poor public policy that will allow policyholders to pass the consequences of discovery sanctions to their insurance

carriers. Because the District Court and Second Circuit's approval of such conduct vitiates the very purpose of preclusive sanctions, which is to deter wrongful conduct, the lower courts have opened the door to a potential onslaught of discovery abuses by policyholders throughout the country. These compelling circumstances warrant this Court's review of this case. Accordingly, AMICO respectfully urges this Court to grant its petition for writ of certiorari.

Dated: July 11, 2002

Respectfully submitted,

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